SUPREME COURT, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

Eunice M. Hill,

Petitioner,

v.

Kansas City Area
Transportation Authority,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

PHILLIP L. MORRIS, ESQUIRE
Counsel of Record
1125 Grand Boulevard, Suite 1117
Kansas City, Missouri 64106-2522
(816) 474-5599

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Eunice M. Hill suffers from severe hypertension, and for over ten (10) years employed mitigating measures, namely a variety of prescription antihypertensive medications, to control her blood pressure so that it did not exceed Department of Transportation (DOT) health certification requirements, and thus Hill could remain employed as a bus driver. With respect to the Americans With Disabilities Act of 1990 (the "ADA") the questions presented are:

I. Whether despite employing mitigating measures Hill was substantially limited in the major life activity of working when she suffered job related injuries and was prescribed pain medications by her employer's workers compensation program physicians, which in combination with her antihypertensive medications caused her to become drowsy during non driving portions of her job, resulting in her discharge for "sleeping while on duty without permission".

II. Whether Hill could request, as a reasonable accommodation, that her employer send her back to the employer's workers compensation program physicians who prescribed her pain medications, for the purpose of a drug screening that would have identified a combination of pain and antihypertensive medications that would not cause her drowsiness during working hours, and if such request was a reasonable accommodation within her employer's control.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is set forth in Appendix A at 1a., and is reported at 181 F.3d 891 (8th Cir. 1999). The opinion of the United States District Court for the Western District of Missouri, Western Division is unreported and dated June 5, 1998, and set forth in Appendix B, at 7a. The District Court ordered entry of its final judgment on June 8, 1998, which is set forth in Appendix D, at 21a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on July 1, 1999. On July 14, 1999 the Petitioner filed a Petition for Rehearing which the United States Court of Appeals denied on August 19, 1999. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Americans With Disabilities Act of 1990, As Amended, 42 U.S.C. §§12101 et seq. (the "ADA"):

42 U.S.C. § 12102(2):

(2) Disability

The term "disability" means with respect to an individual :

(A) a physical or mental impairment that

substantially limits one or more of the major life activities of such individual.

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment.

42 U.S.C. § 12111(9):

(9) Reasonable accommodation

The term "reasonable accommodation" may include -

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12112(b)(5)(A)-(B):

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes -....

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112(d)(4)(B):

(d) Medical examinations and inquiries ...

(4) Examination and Inquiry ...

(B) Acceptable examinations and inquiries:

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

29 C.F.R. Ch. XIV (1998)

Part 1630 – Regulations to Implement the Equal Employment Provisions of the American With Disabilities Act

29 C.F.R. § 1630.2(j)(3)(i,ii):

(3) With respect to the major life activity of working –

(1) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation is the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working".

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(o)(3):

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.14(c) and (d)

(c) *Examination of employees.* A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that.

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed,

when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

(d) *Other acceptable examinations and inquiries.* A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(1) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment, and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

STATEMENT OF THE CASE

This case involves the negative side effects of the petitioner's mitigating measures used to control her severe hypertension, namely her antihypertensive medications. When the petitioner took pain medications prescribed for job related injuries, the combination of pain medications and antihypertensive medications caused her to become drowsy during working hours, and resulted in her discharge for violating the respondent's rule against "sleeping while on duty without permission". Since the respondent's workers compensation program physicians had prescribed the pain medications the petitioner requested that the respondent send her back to such physicians for a drug screen that would have identified a pain medication that would not cause drowsiness when taken concomitantly with her antihypertensive medications. The respondent refused her request for a drug screening and discharged her under its disciplinary rule.

The facts material to consideration of the questions presented in this Petition are:

1. The petitioner was diagnosed with severe hypertension in January 1985 and since then has taken a variety of prescription medications to control her blood pressure.

2. The prescription blood pressure medications

enabled the petitioner to meet DOT health certification requirements for bus drivers, and remain employed as a bus driver with the Kansas City Area Transportation Authority (the "KCATA") until July 26, 1995 when she was discharged.

3. Nevertheless during the ten years prior to her discharge, the petitioner had repeated work attendance problems. In 1986 she had been subject to discharge for "excessive and abusive absenteeism", but at a successful arbitration hearing she asserted that her attendance problems were due, at least in part, to pain medication that made her oversleep.

4. In March, 1995, the petitioner injured her knee when it struck a fare box. She reported her job related injury and was referred to a physician under respondent's workers compensation program who prescribed a pain medication and released petitioner to return to work. On May 23, the petitioner was discovered asleep on her bus prior to the commencement of her route. The respondent's Supervisor's Special Report of the incident documents that petitioner told the person who awakened her that "she had taken some medicine". However, when Superintendent of Transportation, Russell Green subsequently met with petitioner to state that a second incidence of sleeping on the job would result in her discharge, petitioner did not tell Green that medications had caused her to fall asleep on the job on May 23.

5. On June 27, petitioner sprained her wrist while steering a bus. She reported the injury, and a workers compensation physician prescribed pain medications. On July 19, petitioner was found sleeping on her bus at a layover spot on her assigned route. She was directed to finish her route seventeen minutes late. Later that day she

met with Superintendent Green, and explained to Green that she has a problem when she takes pain medications in combination with her hypertension medications. Petitioner testified at her deposition that "I asked them to send me and have me checked out to see what's going on with me, because it's something that's wrong". Instead, respondent discharged petitioner on July 26, 1995.

6. Petitioner filed her initial Complaint in the District Court on January 14, 1997, and on October 7, 1997, Petitioner's First Amended Complaint was filed, alleging that the respondent had violated the American With Disabilities Act (the "ADA") with respect to her by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability", pursuant to 42 U.S.C § 12112(b)(5)(A). The District Court had jurisdiction of the original action pursuant to 28 U.S.C. § 1331. The Respondent filed its Answer on March 26, 1997 and discovery was conducted, including submission of the parties' expert witness reports. The petitioner presented medical evidence that the pain medications can produce drowsiness in combination with her antihypertensive medications. Petitioner's medical evidence concluded that it was one particular class of pain medications, known as nonsteroidal anti-inflammatory drugs, or "NSAIDS" which interacted adversely with her antihypertensive medications.

The respondent filed its Motion for Summary Judgment alleging that petitioner was not a qualified individual with a disability because she could not perform the essential functions of her job with or without a reasonable accommodation, and that petitioner's accommodation request was not reasonable nor within the control of the respondent. On June 5, 1998 the District Court granted the respondent's motion concluding that

petitioner was not qualified to perform the essential functions of her job, that her accommodation request was untimely, unreasonable, and not within the control of the respondent. App. B at 7a – 19a. The District Court entered its judgment on June 8, 1998.

The petitioner filed a timely appeal in the United States Court of Appeals for the Eighth Circuit. On July 1, 1999, the Court of Appeals affirmed the District Court's judgment finding that there was no evidence that the petitioner's physical condition compelled her to take the combination of medications that persistently affected her ability to stay awake on the job and, therefore the petitioner was not substantially limited in her ability to work, and that the petitioner's request for a drug screening was not a reasonable accommodation because it was not timely, petitioner offered no assurance that drug screening would remedy her performance deficiencies, and such accommodation was not within the respondent's control. App. A at 1a-6a. The petitioner's request for rehearing was denied on August 19, 1999. App. C at 20a.

ARGUMENT FOR GRANTING THE WRIT

Irrespective of the Circuit Court's finding that there was no evidence that the petitioner was compelled to take a combination of medications that persistently affected her ability in 1995 to stay awake on the job, it is sufficient to find that the petitioner was compelled to take her antihypertensive medications as a mitigating measure to control her blood pressure, and her use of this mitigating measure restricted the types of medications that she could be prescribed by the respondent's workers compensation program physicians to treat her job related injuries because of negative side effects caused by adverse drug interactions.

Because the Supreme Court did not have occasion to consider whether a petitioner is substantially limited by single or combined medications in Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999), or in Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999), the Court of Appeals has decided an important ADA question that has not been, but should be settled by the Supreme Court.

I. WHETHER A PETITIONER CAN BE SUBSTANTIALLY LIMITED BY THE NEGATIVE SIDE EFFECTS CAUSED BY MEDICATIONS TAKEN FOR MORE THAN ONE CONDITION WAS NOT, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

The Supreme Court has recently reminded the courts and employers that the question of whether a person has a disability under the ADA is an individualized inquiry, and whether mitigating measures play a part in the impairment is a part of that individualized inquiry. Otherwise "it could lead to the anomalous result that courts and employers could not consider any negative side effects suffered by the individual resulting from the use of mitigating measures, even when those side effects are very serious". Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2147 (1999). In its recent ADA decision involving a mechanic who was fired upon discovery that his blood pressure exceeded DOT health certification requirements for drivers of commercial vehicles, the Supreme Court noted that "[t]he Court of Appeals concluded that, when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity", but further noted that "[b]ecause the question whether petitioner is disabled when taking medication is not before us, we have no occasion here to consider whether petitioner is "disabled" due to limitations that persist despite his medication or the negative side effects of his

medication". Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133, 2137 (1999).

The Supreme Court should not limit its consideration of this question to a situation where the side effects result *solely* from the mitigating measures, as persons employing such mitigating measures are subject to injuries, diseases, and other medical conditions requiring treatment and medications for problems in addition to their primary limiting impairment. The petitioner took the pain medications prescribed by the respondent's workers compensation program physicians for the same reason she took her daily antihypertensive medications; to be able to perform the essential functions of her job as a bus driver.

The "individualized inquiry" mandated by the Supreme Court in Sutton, supra, has been apparently limited by the Circuit Court and the District Court to offering suggestions to the petitioner concerning what she could have done to avoid taking a combination of medications that would produce negative side effects. App. A at 5a, App. B at 17a. While the lower Courts' analyses are directed at the petitioner and her combination of medications taken for two unrelated medical problems, the analyses could apply equally to anyone employing medications which produce negative side effects as a mitigating measure to control a medical impairment. The lower courts' analyses puts the onus on the employee to *avoid* medications producing negative side effects rather than on the employer to attempt to *accommodate* the negative side effects and allow the impaired employee to continue working with the *benefits* of medications. See Taylor v. Phoenixville School Dist., 184 F.3d, 296, 309, (3RD Cir. 1999), citing Sutton, supra.

II. THE EIGHTH CIRCUIT COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH A

DECISION OF THE NINTH CIRCUIT COURT OF APPEALS ON THE IMPORTANT MATTER OF REASONABLE ACCOMMODATION FOR DROWSINESS CAUSED BY COMBINED MEDICATIONS, PURSUANT TO THE ADA.

The decision of the United States Court of Appeals for the Eighth Circuit is in conflict with a decision of the United States Court of Appeals for the Ninth Circuit on the important matter of whether an employer has a duty pursuant to 42 U.S.C. § 12112(b)(5)(A) to attempt to find a way to accommodate an employee's limitations resulting from drowsiness on the job due to medication, absent undue hardship to the employer. In McAlindin v. County of San Diego, --- F.3d ---, (1999), 9 A.D. Cases 1217, the employee, a systems analyst, suffered from anxiety disorders, pain disorders, and somatoform disorders, and was prescribed a number of medications for his psychiatric conditions. McAlindin's numerous medications disrupted his normal sleep patterns and caused him to be drowsy at work, although he had been additionally prescribed sleep medication. McAlindin, 9A.D. Cases at 1222. The employee was disciplined for sleeping on the job, and on the issue concerning whether his employer should have accommodated his drowsiness due to the medication, the Ninth Circuit Court noted "[t]he fact that the County ... disciplines all employees who sleep at work does not end the inquiry. Instead the issue is whether a particular accommodation would be burdensome to the employer." McAlindin, 9A.D. Cases at 1224.

III. THE ADA CLEARLY GIVES THE RESPONDENT THE AUTHORITY TO GRANT PETITIONER'S ACCOMMODATION.

The District and Circuit Courts concluded that the petitioner's request for a drug screen medical examination for the purpose of determining if she could perform the essential functions of her job in a non-drowsy state with a change in prescribed pain medications is a "fatally flawed theory", as advanced by a petitioner who was subject to such employer initiated drug screens at any time the employer questioned the ability of the petitioner to perform job related functions. See 42 U.S.C. § 12122(d)(4)(B) and 29 C.F.R. § 1630.14(c) and (d). The Circuit Court cites its earlier opinion in Burroughs v. City of Springfield, 163 F.3d 505 (8th Cir. 1998), for the proposition that the petitioner's request for a drug screen was a request for a second chance to control her treatable medical condition rather than a request for a reasonable accommodation. App. A, at 5a-6a. The petitioner notes that the police officer in Burroughs did receive the benefit of a medical evaluation, after which his employer attempted to reach an accommodation with him. Id at 507. The employee in McAlindin also received a medical evaluation arranged by his employer. See McAlindin, supra, 9 A.D. Cases at 1219. In the case before the Court the petitioner did not fail to control her treatable condition. She took prescribed medications in an attempt to control both her hypertension and her pain incurred as a result of job related injuries. The issue is whether the petitioner's accommodation request was within the respondent's control, and the ADA clearly gives the respondent the authority to arrange the petitioner's requested drug screen. See 42 U.S.C. § 12112(d)(4)(B), and 29 C.F.R. § 1630.14(c) and (d).

The Circuit Court opinion expresses concern that the petitioner offered the respondent no "assurance" that such a drug screening would remedy the petitioner's job performance difficulties. App. A at 5a. The purpose of the drug screen or any other medical examination or inquiry

under the ADA is to assess an employee's ability to perform job related functions, and after such medical inquiry the information obtained concerning the adverse drug interactions with respect to the petitioner's antihypertensive medications and NSAID pain medications could be entered into a medical file for the petitioner so that in the event of future job related injuries the same class of pain medications would not be used again. See 29 C.F.R. § 1630.14(c) and (d). The regulation further provides that "...[s]upervisors and managers may be informed regarding ... necessary accommodations". See 29 C.F.R. § 1630.14(c)(1)(i) and (d)(1)(i). Providing the petitioner with the drug screen she requested, and maintaining the results of such drug screen, would be well within the reasonable accommodation guidelines set forth in 42 U.S.C. § 12111(9) and 29 C.F.R. § 1630(o)(3).

CONCLUSION

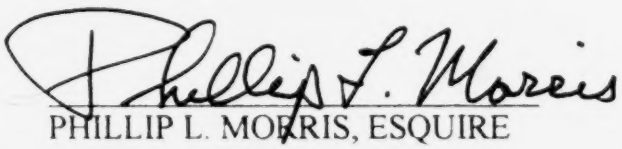
As a result of the Supreme Court's decisions in Sutton and Murphy, the Courts of Appeal must face the issue whether an employee is substantially limited, or "disabled" as a result of the negative side effects of medications applied as a mitigating measure with respect to a medical impairment. The issue before this Court is whether the combined negative side effects of the mitigating medications and the medications the employee may be necessarily prescribed for unrelated medical conditions, should be taken into account in evaluating whether the employee is subject to ADA protection.

Further, in the instance where the negative side effects are drowsiness, as in this case, and as set forth in McAlindin, supra, the Courts of Appeal must be consistent concerning whether the employer has a duty under the ADA to attempt to reach a reasonable accommodation to allow the

employee to continue to perform the essential functions of the job.

The Petition for Writ of Certiorari should be granted, and the language set forth in Sutton and Murphy, supra, should be expanded and clarified to take into account the combined negative side effects of medications the employee may be taking for his primary medical impairment, and medications he may be prescribed for injuries or other unforeseen medical problems that may arise during his employment, because the impaired employee using medications as a mitigating measure is no more immune from unforeseen additional medical problems than the average person.

Respectfully submitted,



PHILLIP L. MORRIS, ESQUIRE
Counsel of Record
1125 Grand Boulevard, Suite 1117
Kansas City, Missouri 64106-2522
Telephone/Fax: 816/474-5599
Alternate Fax: 816/531-7453

Attorney for Petitioner

[APPENDIX A]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2827

Eunice M. Hill, *Plaintiff - Appellant,*	)	
v.	)	Appeal from the United States District Court for the Western District of Missouri.
Kansas City Area Transportation Authority, *Defendant - Appellee.*	)	

Submitted: February 12, 1999

Filed: July 1, 1999

Before WOLLMAN*, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

* The Honorable Roger L. Wollman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 24, 1999.

LOKEN, Circuit Judge.

The Kansas City Area Transportation Authority ("KCATA"), a local government employer, discharged bus driver Eunice M. Hill for twice falling asleep while assigned to a bus route (but not operating the bus). Hill filed this action, claiming that her on-the-job drowsiness was caused by a combination of medications she was taking to remedy hypertension and to relieve pain caused by job-related injuries, and that KCATA violated the Americans with Disabilities Act, 42 U.S.C.§§ 12101 *et seq.* (the "ADA"), by discharging her instead of reasonably accomodating her disability. Hill also asserted state-law contract claims for breach of KCATA's employee handbook and the governing collective bargaining agreement. The district court[1] granted KCATA summary judgment, concluding that KCATA neither violated the ADA nor breached either its handbook or the collective bargaining agreement. Hill appeals. Having reviewed the grant of summary judgment *de novo*, and the summary judgment record in the light most favorable to Hill, the non-moving party, we affirm.

Hill was diagnosed with severe hypertension in January 1985 and since then has taken a variety of prescription medications to control her blood pressure. Hill had repeated work attendance problems between 1985 and her discharge in 1995. For example, only a successful arbitration hearing prevented her discharge in 1986 for "excessive and abusive absenteeism", which she blamed, at least in part, on pain medication that made her oversleep. In March 1995, Hill injured her knee when it struck a fare box. She reported this job-related injury and was referred

[1] The HONORABLE FERNANDO J. GAITAN, JR. United States District Judge of the Western District of Missouri.

to a physician under KCATA's workers compensation program, who prescribed a pain medication and released Hill to return to work. On May 23, Hill was discovered asleep in her bus prior to the commencement of her route. According to the Supervisor" Special Report of the incident, Hill told the person who awakened her that "she had taken some medicine". Superintendent of Transportation Russell Green subsequently met with Hill and reminded her of the KCATA work rule stating that a second incidence of sleeping on the job results in discharge. Hill did not tell Green that medications had caused her to fall asleep on the job.

On June 27, Hill sprained her wrist while steering a bus. She reported the injury, and a worker's compensation physician prescribed pain medications. On July 19, Hill was again found sleeping in her bus – this time during a layover on her assigned route. She was directed to finish the route, seventeen minutes late. Later that day, she met with Superintendent Green. Hill testified at her deposition that she explained to Green she has a problem when she takes pain medications in combination with her hypertension medications. "I asked them to send me and have me checked out to see what's going on with me, because it's something that's wrong." Instead, KCATA discharged Hill on July 26.

After her discharge, Hill applied for and received Social Security disability benefits, representing herself as unable to perform the essential functions of any job. As the district court recognized, that representation does not support Hill's claim that she is a "qualified individual with a disability" for purposes of the ADA, see 42 U.S.C. § 12111(8), but it does not preclude her from proving that she can perform the essential functions of her job with KCATA

with a reasonable accommodation. See Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999).

Hill's ADA claim is that KCATA violated the Act by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability". 42 U.S.C.§12112(b)(5)(A). In evaluating this claim, we must identify Hill's "disability" for ADA purposes, an issue she does not even address on appeal. See 42§12102(2)(definition of "disability"). In the district court, Hill argued her hypertension is a disability. But Hill controlled her hypertension for over ten years with medications that permitted her to perform her job as a KCATA bus driver. Her hypertension is not a disability because, "when medicated, [her] high blood pressure does not substantially limit [her] in any major life activity". Murphy v. United Parcel Ser., Inc., No. 97-1992, 1999 WL 407472, at *3 (U.S. Jun. 22, 1999).

Hill further argues that the drowsiness caused by taking hypertension medication in combination with the pain relievers prescribed for her work-related injuries was an ADA disability. Most assuredly, an essential function of a bus driver's job is the ability to stay awake, and Hill presented medical evidence that her medications can in combination cause drowsiness. But we find no evidence in the record that Hill's physical condition *compelled* her to take a combination of medications that persistently affected her ability in 1995 to stay awake on the job. Therefore, she failed to present sufficient evidence that this alleged physical impairment substantially limited her major life activity of working. See 29C.F.R.§1630.2(j)(3).

Even assuming for summary judgment purposes that Hill's condition was an ADA disability, she must also prove that KCATA discriminated against her on account of

that disability. She was fired for sleeping on the job, not for her medical condition or her need to take medications. Hill nonetheless argues her discharge was ADA-banned discrimination because KCATA failed to honor her request for the reasonable accommodation of a drug screening that would have identified a combination of pain and hypertension medications that would not cause drowsiness. We agree with the district court this is a fatally flawed theory.

In the first place, Hill's request for accommodation was untimely. She never told KCATA supervisors that the medications she was taking in mid-1995 left her uncontrollably drowsy on the job until *after* she committed the offense of twice sleeping on the job, a work rule violation she knew would mandate her discharge. Moreover, when Hill belatedly asked Superintendent Green for help in reassessing her prescription medications, she offered no assurance that such a drug screening would remedy her job performance difficulties. See Mole v. Buckhorn Rubber Prods., 165F.3d 1212, 1218 (8th Cir. 1999). Finally, the reasonable accommodation requested was not within her employer's control. See generally 42 U.S.C.§12111(9)(defining "reasonable accommodation"). KCATA controlled Hill's work conditions, but it was not her doctor or pharmacist. Hill was responsible for her general health. She could have guarded against drug-induced drowsiness by discussing the combination of medications she was taking with her personal physician, who prescribed her hypertension medication, or with the workers compensation program physicians who prescribed her pain medications. Instead, she ignored the problem until her work performance warranted discharge. Like the diabetic police officers in Burroughs v. City of Springfield, 163F.3d 505 (8th Cir. 1998), and Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995), Hill did not

request a disability accommodation, she asked for a second chance to better control her treatable medical condition. That is not a cause of action under the ADA.

Turning to Hill's state law claims, she alleges that KCATA breached its employee handbook by invoking the wrong work rule, and breached the collective bargaining agreement by not taking timely disciplinary action against her *first* offense of sleeping on duty. Putting aside the problem that Hill relies upon employee handbook cases that were overruled by Johnson v. McDonnell Douglas Corp. 745 S.W.2d 661 (Mo. Banc 1988), after careful review of the summary judgment record we agree with the district court that Hill has no credible evidence that KCATA failed to comply with either the employee handbook or the collective bargaining agreement.

The judgment of the district court is affirmed. Appellant's motion for leave to file a supplemental appendix is granted. Appellee's motion to strike appellant's brief is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

[APPENDIX B]

[Filed June 5, 1998]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Eunice M. Hill, *Plaintiff*,	)	
v.	)	No. 97-0051-CV-W-2
Kansas City Area Transportation Authority, *Defendant*.	)	

ORDER

Pending before the Court is defendant's motion for summary judgment on plaintiff's amended complaint. Plaintiff's amended complaint seeks compensatory and affirmative relief for alleged violations of the Americans with Disabilities Act (ADA) as well as damages for wrongful discharge.

Document # 94

I. Facts

Plaintiff Eunice Hill claims to have a "disability" as defined in the ADA, 42 U.S.C. § 12102(2) in that she suffers from acute hypertension. She worked as a bus

driver for defendant for approximately thirteen (13) years. She was discharged on or about July 26, 1995. Amended Complaint § 8, DSOF 45, Exh. 15.

In 1995 plaintiff suffered two injuries, one to her left knee on March 14, 1995, and one to her left wrist on June 27, 1995. Plaintiff received treatment from defendant's worker's compensation physicians for her injuries. "Pain killers" were prescribed to her. Amended Complaint § 9-11. On May 23, 1995, plaintiff was taking the medications prescribed by her own physician for acute hypertension. She was also taking pain killers prescribed by a workers compensation doctor for her knee injury. On that day, plaintiff became "drowsy", and was suspended for three days for "sleeping while on duty without permission". Amended Complaint § 12. She was discharged by the defendant on July 26, 1995 for a "second offense of sleeping while on duty". Plaintiff alleges that her "drowsiness" was again caused by the combination of the drugs.

Plaintiff claims that she provided defendant with a written statement from her physician indicating that if certain medications prescribed as pain killers were taken by the plaintiff in addition to her prescribed medications for acute hypertension, the combination of medications could cause the plaintiff to become drowsy. She argues that defendant knew or had reason to know that pain killers prescribed by "physicians chosen by Defendant for the plaintiff" might cause drowsiness when taken in combination with medications regularly prescribed for plaintiff's acute hypertension. She claims to have asked defendant for a "reasonable accommodation:"

> to have physicians selected by the defendant prescribe pain killers for the plaintiff which would

not cause the plaintiff to become drowsy during employment when taken in combination with the plaintiff's acute hypertension medications.

Amended Complaint § 17.

II. Standard for Summary Judgment

A movant is entitled to summary judgment under Rule 56(c), Fed. R. Civ. P., "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". If the moving party meets this requirement, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court emphasized that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order to establish a genuine issue of fact sufficient to warrant trial. Id. at 586.

In reviewing a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. United States v. Conservation Chemical Co., 619 F. Supp. 162, 179-80 (W.D. Mo. 1985). Additionally, the court should keep in mind that summary judgment is encouraged in appropriate cases:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of every action".

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citation omitted). Accord City of Mount Pleasant v. Assoc. Electric Coop., Inc., 838 F. 2d 268 (8th Cir. 1988).

III. Discussion

A. The Americans With Disabilities Act (ADA) Claims

The ADA is intended to prevent discrimination by an employer "against a qualified individual with a disability because of the disability of such individual". 42 U.S.C. § 12112(a). The term "disability" is defined as

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

"Federal courts analyze disability discrimination claims by using the burden-shifting framework established in McDonnell Douglas [v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973)]". Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 616 (8th Cir.1997). Under this framework, a plaintiff must establish a prima facie case by showing that he (1) was "disabled" within the meaning of the statute; (2) was qualified to perform the essential functions of the job,

with or without reasonable accommodation; and (3) suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. Webb v. Garelick Mfg. Co., 94 F.3d 484, 487 (8th Cir.1996), citing 42 U.S.C. § 12112(a). Once the plaintiff has established his prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. The ultimate burden of proving unlawful discrimination always rests with the plaintiff. St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 507-08, 113 S.Ct. 2742, 2747-48 (1993) (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981)).

1. Judicial Estoppel

Defendant first argues that plaintiff is judicially estoppel from asserting an ADA claim because she applied for and has received Social Security benefits. Judicial estoppel bars a claim if the claimant has taken an inconsistent position under oath in a prior judicial or quasi-judicial proceedings. Moore v. Payless Shoe Source, Inc., ---F.3d---, 1998 WL 138851 (8th Cir. 1998). This court has, in a past case, found the Eighth Circuit's position to be that judicial estoppel would bar recovery under the ADA by a plaintiff who also sought benefits under the Social Security Act. See Budd v. ADT Security Systems, Inc., 1996 WL 932707, (W.D.Mo.), aff'd 103 F.3d 699 (8th Cir. 1996). In affirming this court's decision, the Eighth Circuit held that

> [i]t is sufficient to say that the plaintiff, in applying for social security and disability-insurance benefits, both of which were granted ..., made

> representations about his own physical abilities that are completely at odds with the theory of his lawsuit.

Id.

In a latter opinion, however, the Eighth Circuit recognized that it had espoused a different view five months prior to issuing the Budd opinion. Dush v. Appleton Electric Co., 124 F.3d 957, 962 (8th Cir. 1997). For instance, in Robinson v. Neodata Services, Inc., the court indicated that a plaintiff's filing of an application for Social Security benefits would not bar her recovery under the ADA:

> Social Security determinations ... are not synonymous with a determination of whether a plaintiff is a "qualified person" for purposes of the ADA. [citations omitted] At best, the Social Security determination was evidence for the trial court to consider in making its own independent determination.

94 F.3d 499, 502 n.2 (8th Cir. 1996). In the same month, the court made a similar ruling in the context of a Social Security appeal. In Eback v. Chater, the Eighth Circuit held that it was improper for a vocational expert to assume, in answering a hypothetical question, that an employer would make a certain accommodation for the allegedly disabled plaintiff. 94 F.3d 410, 412 (8th Cir. 1996). The Eighth Circuit relied on a statement by the Associate Commissioner of Social Security that "the ADA and the disability provisions of the Social Security Act have different purposes and have no direct relationship to each other". Id.

Discussing the contrast between Budd and the other cases, the court stated, "[o]ur approach to this issue is less than clear [.]" Dush, 124 F.3d at 962. Having come to this realization, the court decided

> to leave for another day the question of whether and to what extent judicial estoppel ... will operate to prohibit someone what has formerly claimed to be totally disabled from making out a prima facie ADA case.

Id. "As we see it, the issue, at least for the time being, remains open in our Circuit." Id.

This month, the Eighth Circuit has appeared to take a more decisive view, stating "this court ... has declined to hold that the ADA plaintiff judicially estopped to prove he or she is a qualified individual with a disability ... simply because he or she also applied for Social Security disability benefits" Moore 1998 WL 138851 *2. However, the court relied on Dush -- the case in which no more was established but that the court "decided not to decide" the issue -- for its holding.

Most other circuit courts that have addressed the question have rejected judicial estoppel. See Swanks v. Washington Met. Area Transit Auth. 116 F.3d 582, 585-87 (D.C.Cir. 1997) (finding that relief under the ADA was not barred because the SSA gives no consideration to a claimants ability to work with reasonable accommodation); Talavera v. School Bd. Of Palm Beach, 129 F.3d 1214 (11th Cir. 1997) (an employee's certification of total disability on an application for social security benefits does not necessarily bar her an ADA claim); see also Smith v. Dovenmuehle Mortgage, Inc., 859 F.Supp. 1138 (N.D. Ill. 1994) (finding that a rule of judicial estoppel would place a

plaintiff in the untenable position of choosing between the seeking disability benefits or seeking redress for an alleged ADA violation). Indeed, the only circuit court that has strongly supported judicial estoppel has since backed off from its position. In McNemar v. Disney Store, Inc., the Third Circuit held that judicial estoppel was proper to prevent plaintiff from speaking "out of both sides of [his] mouth with equal vigor and credibility". 91 F.3d 610 (3rd Cir. 1996), cert. denied, 117 S.Ct. 958 (1997). Responding to considerable criticism of the McNemar decision, the Third Circuit later stated in dicta that McNemar had articulated a relatively fact-specific holding. The court also noted concern that district courts were misapplying the holding. Krouse v. American Sterilizer Co., 126 F.3d 494 (3rd Cir. 1997). The court stated that "[c]ourts should not assume that McNemar always bars an individual's ADA claims merely because prior representations or determinations of disability exist in the record". Id. At 503 n.5.

The current judicial trend against judicial estoppel matches the Eighth Circuit's indication -- although relying on a case that "decided not to decide" – that judicial estoppel is inappropriate to bar ADA cases when the plaintiff has also sought Social Security benefits. Therefore, the court refuses defendant's invitation to apply principles of judicial estoppel.

2. "Qualified Individual" requesting "Reasonable Accommodation?"

Although taking no stance on judicial estoppel, Dush opinion did state that the burden of overcoming summary judgment on an ADA claim is "particularly cumbersome ... for summary judgment should issue unless there is 'strong countervailing evidence that the employee

is, in fact, qualified.'" Id., citing Mohamed v. Marriott International, Inc., 944 F.Supp. 277, 282 (S.D.N.Y 1996). The Moore court subsequently made it clear that an ADA claimant who made prior sworn representations to the SSA may not deny the truth of such statements, but may attempt to prove that she is nonetheless a "qualified individual with a disability" for ADA purposes. Moore at *2.

In some of plaintiff's Social Security filings, she alleged an inability to work as early as July 14, 1995 and/or July 16, 1995. Both dates are prior to the date of her second incident of sleeping while on duty. In her deposition, plaintiff alleged an inability to work as of July 19, 1995. In subsequent filings, plaintiff alleged an inability to work as of July 26, 1995, the date of her discharge.

In all of her Social Security filings, she portrays herself as a person who cannot perform the essential functions of any job. The vocational expert agreed that she lacked transferable skills, and the Administrative Law Judge (ALJ) awarded disability benefits beginning on July 26, 1995. Plaintiff cannot now be heard to contradict the statements she has made for purposes of obtaining Social Security benefits. The Social Security filings indicate that plaintiff is an individual who cannot perform the essential functions of her former position.

Additional evidence is apparent from the fact that plaintiff twice fell asleep on the job.

> The fact that Plaintiff had not caused an accident does not indicate that Plaintiff could perform [her] job. An employer is not required to wait until an employee injures someone ... to terminate an

employee who exhibits work attributes that could cause an accident.

Jackson v. Boise Cascade Corp., 941 F.Supp. 1122 (S.D.Ala. 1996) Plaintiff has failed to present evidence from which a reasonable jury could find that Plaintiff is qualified to perform the essential functions of his job.

However, even if a plaintiff cannot perform the essential functions of her job because of her disability, she can still show that she is a qualified individual by demonstrating that she would be able to perform the essential functions of her job if her employer would make a "reasonable accommodation". Plaintiff takes the position that defendant should have accommodated her by ordering her workers' compensation doctor to change her "pain killer" medication. However, plaintiff admits she did not even allegedly make this accommodation request until after the second sleeping-on-duty incident. "The ADA does not require clairvoyance." Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 932 (7th Cir. 1995). While the employer is required to make a reasonable accommodation, "it is the responsibility of the individual with the disability to inform the employer an accommodation is needed". Interpretive Guidance on Title I of the American with Disabilities Act, 29 C.F.R. § 1630, Appendix at 407. An ADA claimant, who is in the best position to know what accommodation is needed, must request a reasonable accommodation at the time the disability in question presents a problem on the job. Fussell v. Georgia Ports Authority, 906 F.Supp. 1561, 1569 (S.D.Ga. 1995), aff'd 106 F.3d 417 (11th Cir. 1997). This the plaintiff admittedly did not do.

Even if plaintiff had not been as late with her request as to make it after both sleeping incidents,

plaintiff's request would not have been reasonable. Plaintiff claims that because she made defendant aware of the potentially dangerous side effects of mixing pain killers with acute hypertension medication, defendant was in a position to prevent the problem that occurred. Even if the pain killers were prescribed by "defendant's doctors", as plaintiff continuously refers to them, the court disagrees that the responsibility should have been borne by defendant to ensure that plaintiff's medications were all compatible. As defendant has pointed out, defendant did not prescribe any of plaintiff's medications and is not an expert on drug interaction. Indeed, it is plaintiff who, in conjunction with her two separate prescribing physicians, would be in the best position to guard against possible side effects by altering the prescriptions themselves, the dosage, or the timing (i.e. making a habit to take pills sufficiently before work as to alleviate the side effects). For the reasons mentioned above, the court dismisses plaintiff's ADA claims.

B. Wrongful Discharge

Defendant next motions for summary judgment on plaintiff's wrongful discharge claim. As a general rule, employment in Missouri is at-will. Porter v. Reardon Machine Co., 962 S.W.2d 932 (Mo.App. 1998). In order for an employee to allege a theory of wrongful discharge, a plaintiff must set forth in the complaint "the essential elements of a valid contract, and a discharge in violation thereof". Dake v. Tuell, 687 S.W.2d 191, 193 (Mo. 1985). In Luethans v. Washington University, 894 S.W.2d 169, 172 (Mo. 1995, the Missouri Supreme Court held "an essential element to an employment contract is a statement of duration. Without a statement of duration, an employment at-will is created, which is terminable at any

time by either party with no liability for breach of contract"

Plaintiff claims, however, that the defendant violated its published Manual of Instruction, Operating Rules and Discipline Code ("handbook") and its Agreement Between Local 1287, Amalgamated Transit Union and Kansas City Area Transportation Authority ("collective bargaining agreement"). Plaintiff cites Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120 (Mo.App. 1985) for the proposition that the procedures in an employer's published handbook create the equivalent of a contract with employees. The handbook references to which plaintiff point deal with sleeping on duty. The court has reviewed the handbook procedures and finds no inconsistencies between it and the defendant's behavior. In fact, defendant has acted in complete compliance with its Rule 48 "Sleeping while on duty without permission". That rule states that an employee shall be suspended for three (3) days for a first offense and discharged for a second offense. This was the exact procedure followed in plaintiff's case.[1]

For her argument that defendant violated the collective bargaining agreement, plaintiff asserts that the agreement set a time limit within which management can

[1] Plaintiff attempts to argue that a different version of the rule was in effect at the time of her termination, one which would require three sleeping incidents before termination. However, the court finds the effective date of that rule, relabeled Rule 3.5, to be August 1, 1995. See plaintiff's Exh. 21. Defendant claims that the allowable number of sleeping violations under the new Rule 3.5 is a "disputed fact" and that plaintiff has presented a "defaced" copy of the Work Rule. Reply, p.9. The court need not resolve this dispute, however, because the rule in effect on July 26, 1995, when plaintiff was terminated, was Rule 48, which required only two sleeping incidents before termination.

impose discipline on an employee for an offense. Plaintiff argues that the incident of May 23, 1995 should not have counted as a "first offense of sleeping while on duty" because plaintiff's discipline on July 27, 1995 for the alleged sleeping offense of May 23, 1995 occurred beyond the collective bargaining agreement's stated limitation period. However, it is clear that plaintiff was correctly disciplined for her May incident; she was promptly suspended for three days. Her discharge in July was "discipline" not for the May incident but for the second sleeping incident, which happened on July 19, 1995. To take plaintiff's view would require "incidents" to be wiped from an employee's record after the passage of the time limit for discipline. Hence, an employee would never be subject to discipline for a "second" incident unless two incidents happened in such quick succession that time limit for discipline of the first incident had not already passed, irrespective of whether and when any discipline for the first incident had in fact been imposed. The purpose of the collective bargaining agreement, to provide for prompt discipline of employees, is contorted by plaintiff's last-straw effort to save her claim.

IV. Order

Accordingly, it is hereby **ORDERED** that defendant's motion for summary judgment is **GRANTED**. All other pending motions are dismissed as moot. The above-captioned action is dismissed with prejudice.

/s/
Fernando J. Gaitan, Jr.
United States District Judge

Dated: JUN 05 1998
Kansas City, Missouri

[APPENDIX C]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2827WMKC

Eunice M. Hill, Plaintiff – Appellant,	)	
	)	Appeal from the United States
v.	)	District Court for the
	)	Western District of Missouri.
Kansas City Area Transportation Authority, a body corporate and politic and political subdivision of the States of Missouri and Kansas, Defendant – Appellee	)	

The petition for rehearing filed by the appellant has been considered by the court and is denied.
(5193-010199)

August 19, 1999

Order Entered at the Direction of the Court:

s/
Clerk, U.S. Court of Appeals, Eighth Circuit

[APPENDIX D]

[Filed June 8, 1998]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

Eunice M. Hill, Plaintiff,	)	
v	)	No. 97-0051-CV-W-2
Kansas City Area Transportation Authority, Defendant(s).	)	

____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court**. This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

defendant's motion for summary judgment is GRANTED. All other pending motions are dismissed as moot. The above-captioned action is dismissed with prejudice.

June 8, 1998
Date

R. P. Connor
Clerk

s/
(by) Deputy Clerk

Document # 95